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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In re

Amendment of the Commission's
Rules to Establish New Personal
Communications Services

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GEN Docket No. 90-314

To: The Commission

PARTIAL OPPOSITION TO
PETITIONS FOR RECONSIDERATION
AND COMMENTS OF THE
ASSOCIATION OF INDEPENDENT DESIGNATED ENTITIES

William J. Franklin
WILLIAM J. FRANKLIN, CHARTERED
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006-3404
(202) 736-2233
Telecopy (202) 452-8757
or (202) 223-6739

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SUMMARY OF COMMENTS

The Association of Independent Designated Entities ("AIDE") is comprised of persons and entities likely to be classified as "Designated Entities" under Section 309(j) of the Communications Act.

I

The Commission must adopt build-out rules which encourage the rapid development of nationwide PCS coverage. Because PCS licensees will always cover population centers, its build-out rules should require coverage of specified amounts of market areas. PCS applicants and licensees should be permitted to partition their markets, with each segment independently subject to the build-out rules.

The Commission's requirement that PCS licensees forfeit their licenses if they fail to satisfy the build-out requirements is draconian and unnecessary. Drawing upon its successful cellular experience, the Commission should make the unserved portions of PCS market areas available for third-party licensing upon the earlier of (a) ten years or (b) its licensee's failure to satisfy the Commission's build-out requirements at any construction milestone.

II

The Commission must consider the effect of each decision in its Reconsideration Order upon the Designed Entities, and not reach any decision which is adverse to them. For example, the Commission should permit cellular carriers to make minority

investments in bidding consortia controlled by Designated Entities.

III

As a matter of public policy, the Commission must adopt a non-proprietary definition of the PCS market areas. Even with its offer to license those definitions to the Commission, Rand-McNally's copyright claims to the PCS market definitions -- even if ultimately invalidated -- will bottleneck the efficient development of the PCS industry.

AIDE's Opposition (at 14-15) identifies any of four (4) methods by which the PCS market definitions can be placed in the public domain. Further, the Commission should change the current names of the PCS market areas to "Basic PCS Areas" ("BPAs") and "Major PCS Areas" ("MPAs") to eliminate any Rand-McNally claims to the PCS market nomenclature.

IV

As part of its Petition for Reconsideration, U.S. West seeks to have the Commission expand the proceeding by adopting certain PCS application-processing rules. Those proposed rules are clearly beyond the scope of this rulemaking, and in fact, have been made incorporated into the Competitive Bidding proceeding, albeit without proper notice. The Commission must issue a supplemental Notice of Proposed Rule Making to adopt PCS application-processing rules.

V

The Commission correctly adopted prohibitions against substantial in-market cross-ownership of PCS systems by cellular carriers. Those prohibitions will not greatly hinder the major cellular carriers' participation in PCS. Further, those prohibitions should be extended to include Enhanced SMR licensees and other likely PCS competitors.

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To: The Commission

**PARTIAL OPPOSITION TO
PETITIONS FOR RECONSIDERATION
AND COMMENTS OF THE
ASSOCIATION OF INDEPENDENT DESIGNATED ENTITIES**

The Association of Independent Designated Entities ("AIDE"), by its attorney and pursuant to Section 1.429(f) of the Commission's Rules, hereby opposes or otherwise comments upon certain Petitions for Reconsideration of the Second Report and Order filed in the above-captioned proceeding.^{1/}

AIDE is an unincorporated association, with membership limited to persons and entities likely to be classified as "Designated Entities" under Section 309(j) of the Communications Act. Such Designated Entities are small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

Various AIDE members have extensive legal, technical, financial, and communications backgrounds. Many have owned or managed small businesses, and understand the special needs and problems of small and start-up businesses. The women and minori-

^{1/} Personal Communications Services, 8 FCC Rcd 7700 (1993) (GEN Dkt. No. 90-314) (Second Report and Order).

ty AIDE members also know the unique burdens which they bear. Accordingly, AIDE has a special expertise to comment upon the issues raised in the various Petitions for Reconsideration from the perspective of the various Designated Entities.

I. TO ENCOURAGE NATIONWIDE PCS AVAILABILITY, THE COMMISSION SHOULD SWITCH FROM A POPULATION-BASED TO AN AREA-BASED COVERAGE CRITERIA, PERMIT PARTITIONING OF PCS MARKETS, AND PROVIDE FOR THIRD-PARTY LICENSING OF UNSERVED PCS AREAS.

Proposing a variety of solutions, various petitioners proposed to modify the Commission's PCS coverage requirements. After careful review, AIDE believes that the Commission (1) should switch from a population-based coverage criteria to an area-based coverage criteria, (2) should permit partitioning of PCS markets, and (3) should provide for third-party licensing of unserved PCS areas.

A. Area-Based Coverage Criteria.

A number of petitioners sought reconsideration of the Commission's PCS coverage ("build-out") requirements, i.e., that each PCS system provide service to 33% of the population within its market area within 5 years, 66% within 7 years, and 90% within 10 years.

BellSouth called the Commission's build-out provisions "arbitrary", and requested that the Commission strike them altogether.^{2/} Alternatively, BellSouth asserted (at 10) that

^{2/} Petition for Reconsideration of BellSouth Corporation, et al. ("BellSouth") at 8-9.

the Commission "require[] that [PCS] licensees be operational and providing commercial service within five years...." Pacific Bell concurred, calling the 90% coverage requirement "burdensome" and "onerous."^{3/}

PNSC proposed to leave the MTA build-out requirements unchanged, but sought to reduce the BTA build-out requirements to 20% of the population within 5 years, 30% within 7 years, and 50% within 10 years.^{4/} Southwestern Bell took a different approach, asking the Commission to reduce the build-out requirements only for the non-aggregated 10 MHz PCS licenses to 25% of the population within 10 years.^{5/}

Based on its analysis that the build-out provisions discriminated against rural telephone companies, NTCA requested that the Commission lower the build-out standards in rural areas and articulate standards for waivers thereof.^{6/} RCA concurred with the NTCA analysis.^{7/}

AIDE respectfully suggests that the Commission has focused on the wrong measure of PCS coverage. As has been demonstrated

^{3/} Petition for Reconsideration of Pacific Bell and Nevada Bell ("Pacific Bell") at 5-6.

^{4/} Petition for Reconsideration of Personal Network Services Corporation ("PNSC") at 10.

^{5/} Petition for Reconsideration of Southwestern Bell Corporation ("Southwestern Bell") at 6-7.

^{6/} Petition for Reconsideration and Clarification of the National Telephone Cooperative Association ("NTCA") at 8-10.

^{7/} Petition for Reconsideration of Rural Cellular Association ("RCA") at 6-7.

by the nationwide expansion of cellular coverage, PCS licensees will always cover population centers. After all, a concentration of people is a certain area of PCS demand. However, as reflected by the NTCA and Rural Cellular Association petitions, in more sparsely populated areas, the 90% population criteria may be easily satisfied with limited coverage.

A better PCS coverage criterion would be based on area coverage, say 10% of the area within 1 years, 20% of the area within 2 years, and 40% of the area within 4 years.^{8/} AIDE respectfully suggests that the elimination or substantial cutback of PCS coverage requirements, as BellSouth and others suggest,^{9/} would encourage warehousing and reveals a lack of confidence in PCS demand predictions.

^{8/} In Argument I(c), infra at 5-7, AIDE draws on the Petitions for Reconsideration filed by U.S. Intelco Networks, Inc. ("USIN") and by the Alliance of Rural Area Telephone and Cellular Service Providers ("ARATCSP") to suggest a regulatory structure which would (a) encourage nationwide PCS coverage while (b) preserving marketplace flexibility for PCS licensees without coercive Commission regulations.

^{9/} See Petition for Reconsideration and Clarification of Sprint Corporation ("Sprint") at 13-14. Sprint makes the dangerous suggestion that cellular carriers should be permitted to use their cellular coverage to demonstrate compliance with PCS build-out requirements. It is difficult to envision a proposal which would better facilitate the warehousing of PCS spectrum by cellular carriers. Sprint's suggestion is contrary to the public interest, and should be rejected.

B. Market Partitioning.

Several petitioners have proposed PCS market partitioning as a mechanism for encouraging the nationwide construction of PCS systems. For example, ARATCSP proposes (at 1-5) that the Commission permit flexibility in PCS market definitions, with applicants and licensees being permitted to partition their market into separate licensed areas. ARATCSP also proposes (at 5-7) that each partitioned area be independently subject to the Commission's build-out rules. NTCA (at 1-8), RCA (at 7-8), and McCaw^{10/} (at 6-8) made similar requests.

AIDE respectfully suggests that the Petitioners seeking PCS market partitioning are correct. **The Commission should permit the voluntary partitioning of PCS markets, by bidding consortia, full-market settlements, or post-grant modification applications.** Partitioning has proven successful in the cellular context, and it is likely to do so for PCS.

C. Fill-In Licensing.

As a whole, the Commission's cellular licensing policies have been successful. A substantial portion of that success resulted from its fundamental policy favoring nationwide cellular service. An integral part of the implementation of that policy was the Commission's build-out rules, which permitted third parties to file applications for the unserved portions of each

^{10/} Petition for Reconsideration and Clarification of McCaw Cellular Communications, Inc. ("McCaw").

cellular market as of the end of five years of commercial service, in essence a "use it or lose it" policy for cellular. This policy carefully balanced the goal of marketplace flexibility to select their cellular coverage area against the Commission's policy of nationwide cellular coverage.

However, the PCS Second Report and Order departed from the successful cellular policy by adopting a draconian "total forfeiture" policy. Under this policy, a PCS licensee who fails to satisfy the Commission's build-out rules forfeits its entire license, both for the portions being served and the portions which are ignored. This policy, if actually implemented and enforced, would result in disruption in PCS service.

Two petitioners herein, ARATCSP (at 6) and USIN (at 7-8), have proposed application of the cellular unserved-area policies to PCS. AIDE supports these proposals, with the further refinement that **each PCS market and frequency block should be subject to unserved-area applications upon the earlier of (a) ten years or (b) its licensee's failure to satisfy the Commission's build-out requirements at any construction milestone.**

This proposal would permit licensees to implement competing visions for PCS service (e.g., high-power, broad coverage; low-power, focused coverage) without sacrificing the Commission's fundamental goal of nationwide PCS coverage. If a licensee felt that PCS would best be implemented by providing low-power PCS coverage in major urban areas, it could do so without risk to its license. The marketplace -- and not the Commission's build-out

requirements -- would decide how PCS was to be implemented for each area.

At each build-out deadline (four, seven, and ten years currently; one, two, four, and ten years under AIDE's proposal), the licensee would face a business decision whether to expand coverage (thus keeping its license safe from unserved-area applications) or to follow its business plan by turning the remainder of its market back for third-party licensing.

Depending on their business plans and market niche, different PCS licensees for the same market area might make different decisions for coverage expansion. However, at the end of the ten-year PCS licensing period, the entire market area for each PCS frequency block would be licensed to one or more entities seeking to serve all commercially viable portions of the area.

II. TO COMPLY WITH THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993, THE COMMISSION MUST ADOPT SUBSTANTIVE PCS RULES FAVORING DESIGNATED ENTITIES.

In adopting Section 309(j) of the Communications Act, Congress specified that an objective of competitive bidding was to:

Promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies,

and businesses owned by members of minority groups and women....^{11/}

To implement this goal, Congress required the Commission, in its implementation of competitive bidding regulations, to:

Ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures....^{12/}

Petitioner PNSC (at 2-12) correctly realizes that the Commission must adopt substantive PCS rules to implement this unambiguous public policy. **In its reconsideration decision here, the Commission must consider the effect of each decision upon the Designated Entities, and not reach any decision which is adverse to them.**

For example, Comcast correctly observes that the Commission should permit cellular carriers to make minority investments in bidding consortia controlled by Designated Entities.^{13/} Such a policy would implement Congressional policy and assist Designated Entities in competing on a level economic playing field with larger carriers.

Conversely, USIN (at 4-6) is completely off base in suggesting that the PCS set-aside frequency block should be reserved

^{11/} Section 309(j)(3)(B); Competitive Bidding, 8 FCC Rcd 7635, 7636 (1993) (PP Dkt. No. 93-253) (Notice of Proposed Rulemaking) ("Competitive Bidding NPRM").

^{12/} Section 309(j)(4)(D); Competitive Bidding NPRM, supra, 8 FCC Rcd at 7636-37.

^{13/} Comcast Corporation Petition for Reconsideration ("Comcast") at 18-19.

solely for rural telephone companies. This suggestion is contrary to Section 309(j)(3)(B), and must be rejected out of hand. While AIDE continues to believe that Designated Entities should have a substantial preference for all auctionable licenses,^{14/} whatever preferences that are awarded must apply equally to the four classes of Designated Entities.

III. AS A MATTER OF PUBLIC POLICY, THE COMMISSION MUST ADOPT A NON-PROPRIETARY DEFINITION OF THE PCS MARKET AREAS.

Several parties have sought reconsideration of the Commission's decision apparently to base its PCS market areas on a proprietary definition, i.e., the "Basic Trading Areas" and "Major Trading Areas" defined by Rand-McNally ("RMN"). AIDE shares these concerns, and agrees that the Commission must have non-proprietary PCS market definitions.^{15/}

For example, Telocator argued that it would be poor public policy for RMN (or any private company) to have a copyright claim over portions of the FCC's Rules, especially as fundamental a rule as the PCS market definitions.^{16/} Telocator is also con-

^{14/} See Petition for Reconsideration of Point Communications Company ("Point") at 5.

^{15/} It must be emphasized that no petitioner, or AIDE, seeks in this proceeding to challenge RMN's right to copyright or sell its Commercial Atlas & Marketing Guide or the collection of demographic data contained therein. The Petitions are focused exclusively on RMN's claims to the BTA and MTA definitions as adopted by the Commission for PCS.

^{16/} Petition for Reconsideration of Telocator, The Personal Communications Industry Association ("Telocator") at 16-18. Accord, Point at 4.

cerned that RMN might modify its BTA and MTA definitions to be inconsistent with the Commission's intent for PCS, or that the defining 1982 edition of RMN's Commercial Atlas & Marketing Guide might go out of print or otherwise become unavailable over time.

Killen argues that RMN's substantial charges for private licenses of the BTA/MTA market definitions discriminates against smaller businesses.^{17/} Killen fears that small businesses will be unable to acquire the definitions at a reasonable price, or that their consultants will pass the RMN license fees through as higher charges for their services. Id.

AIDE is also concerned that RMN could reshape the FCC's PCS rules by discriminating between different members of the communications industry in copyright licensing.^{18/} Reportedly, RMN's current licensing fees for its BTA and MTA definitions are substantially higher than those charged prior to the Commission's adoption of the BTA and MTA definitions for PCS.

^{17/} Petition for Reconsideration of Killen & Associates, Inc. ("Killen") at 1-2. Accord, NTCA at 4 n.4. Killen states that RMN charges \$395 for its Commercial Atlas & Marketing Guide, \$1,000 for a diskette containing RMN's BTA and MTA definitions for internal use, and \$12,000 plus 5% of net sales for a license to resell RMN's BTA and MTA definitions.

^{18/} If the Commission nevertheless retains RMN's allegedly proprietary PCS definitions, its agreement with RMN must provide -- at the minimum -- that RMN will (a) make its BTA and MTA definitions available to the public for either internal use or resale on a non-discriminatory basis, (b) charge the same licensing fee to all similarly situated users of the definitions, and (c) not increase the fee except to cover increased costs of production.

Other Petitioners are concerned about RMN's asserted copyright over the BTA and MTA definitions. UTC expresses concern about the permissible uses to which Commission applicants and licensees might make of RMN's assertedly copyrighted BTA and MTA definitions.^{19/} Telocator (at 18 & n.33) argues that RMN lacks a valid copyright over its BTA and MTA market definitions:

One cannot claim copyright protection for facts or ideas, but only particular expressions of ideas. In the case of BTAs and MTAs, [RMN] legitimately may claim a copyright in the specific maps it has produced but cannot claim a copyright in the fact or idea that certain counties are grouped in certain BTAs and MTAs. See BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc., 999 F.2d 1436, 1441 (11th Cir. 1993); Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1464 (5th Cir. 1990) (finding certain maps not copyrightable); Matthew Bender & Co. v. Kluwer Law Book Publishers, 672 F.Supp. 107 (S.D.N.Y. 1987).

BellSouth Advertising holds that a telephone company cannot copyright its yellow pages, or even its topics or classifications of businesses within the yellow pages. Further, where the idea can only be expressed in one way, such as RMN's listing of the counties which comprise a BTA, then the listing merges into the idea and ceases to be copyrightable.

Based on all these arguments, the Petitioners ask that the FCC adopt PCS market definitions not subject to an asserted RMN copyright.^{20/} Noting that the FCC's BTA/MTA definitions are not

^{19/} Petition for Reconsideration of Utilities Telecommunications Council ("UTC") at 21 & n.23.

^{20/} An Attachment to Telocator's Petition contains a county-by-county listing of the BTAs and a BTA-by-BTA listing of the
(continued...)

the same as RMN's, UTC (at 20 & n.21) asserts that the FCC exercised its independent judgment in developing the definitions.^{21/} UTC (at 21) accordingly asks the FCC independently to prepare a BTA/MTA component listing for inclusion in the PCS rules.

Perhaps in response to these concerns, RMN proposes to license its BTA and MTA definitions to the Commission at no charge, but subject to the following conditions:^{22/}

- RMN proposes that the Commission could disclose the BTA and MTA definitions in its Rules at no charge "for the internal use of the recipient of the rules."^{23/}
- RMN defines "internal use" "to include references to the listings or reproduction of parts of the listings in any auction bid documents or other correspondence with the FCC as well as any internal analysis of the [RMN BTAs or MTAs]".^{24/}
- While "[r]eproduction of the listings as a result of reproducing the rules themselves" is permissible, RMN asserts that "reproduction or resale of the listings in whole or

^{20/} (...continued)

MTAs as defined by the FCC. AIDE supports this as an example of the PCS market definitions which the FCC must place in the public domain.

^{21/} The FCC's redefinition of the PCS market areas could well be continuing. Point (at 4-5) requests that the Commission use its MSA and RSA market definitions for PCS. Based on a substantial demographic analysis of Puerto Rico, Pegasus Communications, Inc. requests that the Commission split Puerto Rico into at least two (2) BTAs.

^{22/} See Letter dated December 8, 1993, from Deborah Lipoff, RMN's Assistant General Counsel, to the Commission's Office of the General Counsel ("RMN Letter"). The RMN Letter is filed in the docket of this proceeding.

^{23/} RMN Letter, Summary of Terms, ¶¶ 1-2. However, RMN did not permit the Commission to use BTA and MTA definitions for services other than PCS.

^{24/} Id., ¶3.

substantial part and use of the listings or any part thereof to create derivative works for resale will not be permitted without a license from [RMN]."^{25/}

- RMN wants the Commission's Rules to contain RMN's copyright notice and a notice "clarifying the permitted use of the listing...."^{26/}

In AIDE's view, RMN has failed to grasp the fundamental concept that the free flow of information between members of the communications industry is a fundamental prerequisite to the development of the PCS industry.

PCS is not, for example, a wholesale plumbing parts business, which might use the RMN Commercial Atlas & Marketing Guide to lay out its sales territories. To the contrary, the "internal use" of PCS definitions by a substantial portion of the communications industry is to advise others of the definitions and their significance in a variety of regulatory and business contexts.

For this reason, RMN's conditions are unworkable in practice, and could well result in RMN extracting perpetual royalties from every PCS licensee, consultant, communications attorney, or other members of the PCS communications industry. Consider the following examples:

- A PCS licensee's marketing materials shows the boundaries of its market in depicting coverage. Does RMN have a claim against 5% of the licensee's total system revenues?
- A speaker for a PCS seminar uses the FCC's rules to develop slides showing the relationship between various BTA and MTA boundaries. Does RMN have a claim against 5% of the net revenues from the seminar?

^{25/} Id., ¶4.

^{26/} Id., ¶5.

- A communications attorney or engineering firm draws a map showing the BTA and MTA boundaries as part of materials provided to its clients to inform them of the opportunity to file PCS applications. Does RMN have a claim against 5% of the firm's PCS application revenues?
- A communications system broker includes a listing of the counties comprising a MTA as part of its materials offering a given MTA license for sale. If the system is sold, does RMN have claim against 5% of the broker's commission, or even against 5% of the sale price of the system?
- A publisher of Commission rules and other documents separately reprints the Commission's specific rule listing the PCS market definitions. Does RMN have a claim against 5% of the publisher's revenues for that rule? Does it make a difference if the publisher reprints all the PCS rules, or perhaps only the PCS technical rules?
- A computer service bureau (for example, Lexis or WestLaw) has the Commission's Rules available for on-line use. Does RMN have a claim against 5% of the service bureau's revenues when a subscriber downloads the Commission's PCS market definitions, or perhaps the definition for one specific MTA?

None of these examples falls within the permitted uses identified in the RMN Letter, and each use appears to require the payment of the 5% license fees to RMN.

Accordingly, AIDE shares the various Petitioners' concerns about RMN's copyright claims to the PCS market definitions. **As a threshold matter, the Commission should change the current names to Basic PCS Areas ("BPAs") and Major PCS Areas ("MPAs") to eliminate any RMN claims to the PCS market nomenclature.**

Further, AIDE would support any of the following solutions to this proprietary-rule problem:

- As suggested by UTC (at 21), that "the Commission adopt its own definitions of PCS licensing areas, based on an independent analysis of relevant demographic information...."
- As suggested by Point (at 4-5), that the Commission revert to the cellular MSA/RSA market definitions for PCS.

- As suggested by Telocator (at 16-18) and others, that the Commission declare its (as opposed to the RMN) BTA and MTA definitions to be in the public domain and independently publish them in the Rules or by appropriate Public Notices.
- Recognizing that the Commission's continued use of the modified BTA and MTA definitions will sell more copies of its Commercial Atlas & Marketing Guide, that RMN places its BTA and MTA definitions in the public domain.

Without any of these actions, RMN's copyright claims to the PCS market definitions -- even if ultimately invalidated -- will bottleneck the efficient development of the PCS industry.

IV. AS REQUIRED BY THE ADMINISTRATIVE PROCEDURE ACT, THE COMMISSION CANNOT ADOPT RULES FOR PROCESSING PCS APPLICATIONS WITHOUT AFFORDING INTERESTED PARTIES FAIR NOTICE THEREOF AND THE OPPORTUNITY FOR PUBLIC COMMENT.

As part of its Petition for Reconsideration of the PCS Second Report and Order, U.S. West seeks to have the Commission expand the proceeding by adopting certain PCS procedural rules.^{27/} Except for U.S. West's proposed correction to inadvertent errors to Sections 99.12 and 99.16, new PCS Rules adopted in the Second Report and Order, those proposed procedural rules are clearly beyond the scope of this rulemaking.

Specifically, the Second Report and Order states (8 FCC Rcd at 7702 & n.2) that "Issues regarding licensee selection procedures ... are being addressed in separate proceedings." To support this statement, the Second Report and Order cites the competitive bidding and classification-of-mobile-service proceed-

^{27/} U.S. West Petition for Expedited Partial Reconsideration and for Clarification ("U.S. West") at 22-25 & Attachments A-B thereto.

ings, dockets PP No. 93-253 and GN No. 93-252 respectively.

Paragraph 128 of the Competitive Bidding NPRM purports to propose the various rules for which U.S. West "seeks reconsideration" here.^{28/} U.S. West clearly has raised its issues in the wrong proceeding.

Indeed, U.S. West's Petition here is deficient as the Commission's Competitive Bidding NPRM. Both lack a specific proposal for PCS processing rules.^{29/} As U.S. West notes (at

^{28/} Competitive Bidding NPRM, supra, 8 FCC Rcd at 7656. In its Comments and Reply Comments in that proceeding, AIDE argued that the Commission's "one-sentence" attempt to propose a panoply of PCS application-processing rules violated Section 1.413(c) of the Commission's Rules.

Indeed, U.S. West appears tacitly to support AIDE's position by noting (at 24 & n.54) that the processing rules "have little relevance to the issues" in the Competitive Bidding proceeding and that "none of the hundreds of commenters in the Competitive Bidding Rulemaking addressed these provisions in any detail." Tellingly, U.S. West was one of those parties who did not comment in that proceeding upon the issues which it nevertheless raises here.

^{29/} This paucity of discussion should be compared with the detailed proposals, extensive comments, and exhaustive discussions thereof in other recent proposed and final revisions of various land-mobile rules. See, e.g., PCS Second Report and Order, supra, (73 parties produced 61-page decision); Competitive Bidding NPRM, supra (63-page proposal for auction rules); Regulatory Treatment of Mobile Services, 8 FCC Rcd ____ (FCC 93-454, released October 8, 1993) (Notice of Proposed Rulemaking) (GN Dkt. No. 93-252) (32-page proposal); Replacement of Part 90, 7 FCC Rcd 8105 (1992) (Notice of Proposed Rulemaking) (PR Dkt No. 92-235) (419-page proposal); Personal Communications Services, 7 FCC Rcd 5676 (1992) (Notice of Proposed Rulemaking) (GEN Dkt. No. 90-314) (97-page proposal); Revision of Part 22, 7 FCC Rcd 3658 (1992) (Notice of Proposed Rulemaking) (CC Dkt. No. 92-115) (98-page proposal); Cellular Unserved Areas, 6 FCC Rcd 6185 (1991) (First Report and Order and Memorandum Opinion and Order on Reconsideration) (CC Dkt. No. 90-6) (35 commenting parties produced an 87-page decision); 220-222 MHz Band, 6 FCC Rcd 2356 (1991) (Report and

(continued...)

25), "The Part 22 Rules proposed for PCS ... include numerous rule sections which are no longer necessary under an auction process [or] are inconsistent with provisions applicable to PCS...." U.S. West's proposal (at 25 n.55 & Attachment B) is limited to identifying the subject matter of "other PCS-specific rules" which "[t]he Commission should also consider in this proceeding..." and identifying the corresponding Part 22 rule. U.S. West did not propose the text or concept for specific, additional PCS rules upon which other parties could comment.

As is true with the Competitive Bidding NPRM, the Part 22 rules identified by U.S. West have no immediate applicability to PCS service. By their terms, they are limited to Public Land Mobile Service, or further limited to Domestic Public Cellular Radio Telephone Service, both in non-PCS frequency bands. Further, unlike the Competitive Bidding NPRM, U.S. West failed to identify any Part 90 Rules which might be applicable to private PCS services.

Moreover, the substance of PCS regulation differs dramatically from PLMS, DPCRTS, and PLMRS regulation. The three existing services license transmitters on a site-by-site basis; the

^{29/} (...continued)

Order) (PR Dkt. No. 89-522) (69 commenting parties produced a 35-page decision); Revision of Part 22, 95 FCC 2d 769 (1983) (Report and Order) (CC Dkt. No. 80-57) (23 commenting parties produced a 196-page decision). Each of those proceedings illustrates the amount of notice required for the proposal and adoption of PCS processing rules.

PCS regulations prohibit site-by-site licensing.^{30/} PCS has a ten-year license term with renewal expectancy; PLMRS, a five-year term without renewal expectancy. DPCRTS requires detailed coverage maps; PCS apparently does not. PLMS and DPCRTS both require detailed engineering calculations as part of the application; PCS does not.

In summary, the Commission needs to issue a supplemental Notice of Proposed Rule Making to adopt the PCS application-processing rules vaguely alluded to in the Competitive Bidding NPRM and in U.S. West's Petition here. The Commission cannot lawfully adopt PCS application-processing rules based upon U.S. West's vague discussion of the subject in its Petition.

V. THE COMMISSION SHOULD EXPAND ITS LIMITATIONS ON CELLULAR CROSS-OWNERSHIP OF PCS SYSTEMS TO INCLUDE OWNERSHIP OF OTHER SYSTEMS WHICH COMPETE WITH CELLULAR, SUCH AS ESMR.

The PCS Second Report and Order (8 FCC Rcd at 7742-45) adopted certain ownership limitations for cellular licensees in PCS systems. AIDE supports those limitations, and favors their expansion to Enhanced SMR licensees and other providers of PCS-competitive mobile service.

With a variety of arguments and proposals, CTIA and various major cellular carriers challenge the Commission's cellular/PCS cross-ownership rules. They essentially argue (as CTIA colorful-

^{30/} See Section 99.11(b) of the Commission's Rules.

ly put it) that the Commission's rules "exclud[e] the involved and the qualified."^{31/} This is a dangerous simplification.

Each major cellular carrier has a bundle of resources which it might bring to the PCS table. The great majority of available resources are market-independent, i.e., the resources are equally available for PCS in all parts of the country whether (or not) the carrier operates a cellular system in the same area as its PCS system.^{32/} For example, they all have established management teams, "deep-pocket" financial resources, engineering staffs, billing and marketing departments, communications attorneys and lobbyists, personnel departments, and similar "back-office" units.

In contrast, the cellular-specific infrastructure (microwave links, sales forces, cell sites, PSTN interconnections, etc.) is now committed to cellular, and in a well-run business, operating at capacity or with expansion room committed for anticipated future increases in cellular demand. It is unlikely that a carrier can shift much of its market-specific cellular infra-

^{31/} Petition for Reconsideration of the Cellular Telecommunications Industry Association ("CTIA"), Appendix B.

^{32/} This principle is best illustrated by historic practice of major telephone companies of acquiring cellular systems without regard to the relationship between the cellular markets being acquired and their local exchange areas. For example, the fact that Pacific Telesis has its local telephone service only in California and Nevada did not stop it from successfully constructing and operating the non-wireline cellular system in Atlanta, Georgia.

structure to PCS, at least without cannibalizing its cellular operations.

Thus, each cellular carrier's existing market-specific resources will require substantial development or modification to implement a PCS system, while its back-office functions can be applied to PCS systems anywhere in the country. Each cellular carrier -- even the largest one -- only serves a fraction of the markets. For these reasons, the Commission properly may disregard the cellular carriers' claims that they will be foreclosed from widespread participation in PCS,^{33/} or that they will be somehow hobbled in bringing their existing resources to bear in implementing a PCS system.

The Commission correctly recognized that a cellular carrier licensed to provide PCS service in the same market area is likely to be less than aggressive in rolling out its PCS service. Each cellular system will have business plans, marketing targets, and the like, and its management reasonably can be assumed to be unwilling to sacrifice those goals in order to implement a service which will compete with its existing operations.

^{33/} AIDE supports the notion that the cellular cross-ownership rule should not operate to foreclose the participation by telephone companies qualifying as Designated Entities under Section 309(j) in PCS systems, especially in rural areas. Similarly, with respect to nationwide bidding consortia, if ultimately permitted, the Commission should provide a mechanism -- perhaps linked bids by regional consortia with differing ownership structures -- in which cellular carriers are not excluded from nationwide PCS bidding.